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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

3 UNITED STATES OF AMERICA, New York, N.Y.

4 v. 15 Cr. 379 (PKC)

5 GEOVANNY FUENTES RAMIREZ,

6 Defendant.

7 -----x Remote Conference

8 February 12, 2021  
9 12:00 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13

14 APPEARANCES

15 AUDREY STRAUSS

16 Acting United States Attorney for  
the Southern District of New York

17 BY: MATTHEW J. LAROCHE  
JACOB H. GUTWILLIG  
MICHAEL D. LOCKARD  
18 Assistant United States Attorneys

19 MOSKOWITZ & BOOK, LLP  
20 Attorneys for Defendant  
BY: AVRAHAM C. MOSKOWITZ

21 SCHULMAN TRIAL, PLLC  
22 Attorneys for Defendant  
BY: EYLAN SCHULMAN

23 Also Present:

24 Rossana Testino Burke,  
Mirta Hess Loedel,  
25 Spanish Interpreters

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1                   THE COURT: This is 15 Cr. 379, United States of  
2 America v. Geovanny Fuentes Ramirez.

3                   The appearance for the government, please.

4                   MR. LAROCHE: Good afternoon, your Honor. This is  
5 Matt Laroche for the government, and also participating on this  
6 call for the government are Jacob Gutwillig and Michael  
7 Lockard.

8                   THE COURT: All right. Good afternoon to all three of  
9 you.

10                  And appearing for the defendant?

11                  MR. MOSKOWITZ: Good afternoon, your Honor. This is  
12 Avi Moskowitz on behalf of Mr. Fuentes Ramirez, and on the  
13 phone with me is co-counsel, Eylan Schulman, who is a part of  
14 the CJA Mentoring Program.

15                  THE COURT: All right. Good afternoon to both of you.

16                  And good afternoon to Mr. Fuentes Ramirez. Can you  
17 hear me, sir?

18                  THE DEFENDANT: Good afternoon, your Honor. I hear  
19 you perfectly.

20                  THE COURT: Thank you.

21                  We have a court certified interpreter today,  
22 Ms. Rossana Testino Burke, is that correct?

23                  THE INTERPRETER: Yes, your Honor.

24                  THE COURT: Thank you.

25                  Mr. Fuentes Ramirez, you have the right to participate

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1       in a conference, generally speaking, in a courtroom, with the  
2       judge on the bench, with the prosecutor present, the  
3       interpreter and, most importantly, defense counsel at your  
4       side. I understand that you are prepared to waive that right  
5       and to proceed with this proceeding today telephonically. Is  
6       that correct, sir?

7                  THE DEFENDANT: That's correct, your Honor.

8                  THE COURT: All right. If at any point during this  
9       proceeding you wish to speak in private with your lawyer or  
10      either of your lawyers, please let me know, and I will give you  
11      the opportunity to do so. Do you understand that?

12                 THE DEFENDANT: Yes, your Honor. Thank you.

13                 THE COURT: Before we get into the substance of  
14      things, I want to state on the record that I direct the  
15      prosecution to comply with its obligation under *Brady v.*  
16      *Maryland* and its progeny to disclose to the defense all  
17      information, whether admissible or not, that is favorable to  
18      the defendant, material either to guilt or punishment, and  
19      known to the prosecution.

20                 Possible consequences for noncompliance may include  
21      dismissal of individual charges or the entire case. Exclusion  
22      of evidence and professional discipline are court sanctions on  
23      the attorneys responsible.

24                 I will be entering a written order more fully  
25      describing the obligation and the possible consequences of

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1 failing to meet it, and I direct the prosecution to review and  
2 comply with that order.

3 Does the prosecution confirm that it understands its  
4 obligation and will comply.

5 MR. LAROCHE: Yes, your Honor. We do confirm.

6 THE COURT: Thank you.

7 Let me turn first to the government's sealed requests  
8 one and two. Am I correct, Mr. Moskowitz, that there is no  
9 objection to either of them, is that correct?

10 MR. MOSKOWITZ: Your Honor, I'm not sure -- if we are  
11 talking about sealing --

12 THE COURT: Let me put it this way. This is -- the  
13 first request relates to Witness 1 testifying under a pseudonym  
14 and request number two is that the names of jurors, alternate,  
15 and members of the venire not be disclosed on the public  
16 record, although they will be provided to defense counsel, as  
17 would the identity and the correct name of Witness 1.

18 MR. MOSKOWITZ: That's correct, your Honor. We have  
19 no objection to either of those requests.

20 THE COURT: All right. And I find that both are  
21 warranted because, in the case of the first, a risk of  
22 potential retaliation, due to the nature of the charges, a  
23 previous incident that took place within two weeks of the  
24 conclusion of the Hernandez Alvarado trial, which is referred  
25 to in the briefing, at least the government's briefing, and the

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1 limited ability of the Honduran government to protect the  
2 witness's family.

3                 Also with regard to jurors, there is reasonable  
4 grounds to believe that jurors would be in fear from disclosure  
5 and that fear, for reasons stated above, would have a basis in  
6 fact.

7                 So I am granting both of those applications.

8                 So now let me turn to the government's motion *in*  
9 *limine* with regard to what I will call narcotics-related  
10 corruption, and this is inclusive of bribery of government  
11 officials, police officials. Is there anything that you wanted  
12 to say from the defense standpoint in addition to what is in  
13 your brief?

14                 Let me say, before we get too deeply into all of this,  
15 that as a judge I certainly can draw lines as to relevance of  
16 particular lines of inquiry or lack of relevance of a line of  
17 inquiry. That is somewhat easier to do than knowing whether or  
18 not the requirements for the admission of a statement by a  
19 coconspirator during and in furtherance of a conspiracy have  
20 been met. That sometimes requires evidence or taking it  
21 subject to connection in the evidence before the Court can make  
22 a final determination.

23                 I have the benefit of having presided over the  
24 Hernandez Alvarado trial, but that was a different defendant  
25 facing somewhat different charges, represented by different

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1 counsel, so I recognize that.

2           But is there anything you wanted to add from your  
3 briefing, Mr. Moskowitz?

4           MR. MOSKOWITZ: Judge, I understand, reading between  
5 the lines, what your Honor is saying, and I can certainly  
6 conceive of how such evidence could be relevant. The point  
7 that I tried to stress in my brief, both with respect to this  
8 and with respect to the alleged homicide, is that, unlike the  
9 situation in the Hernandez case, where there was videotaped  
10 evidence, as I understand it, and corroborating evidence, in  
11 this case we have the testimony of one, maybe a second witness,  
12 and a lot of hearsay or a lot of third-party statements to the  
13 cooperating witness.

14           We have had no opportunity to investigate this, to  
15 take testimony from potential witnesses in Honduras, and that  
16 is -- that makes a big difference to us here. There have  
17 clearly been public statements from the government of Honduras  
18 saying that this was all false, and theoretically that would  
19 mean that, if we got letters rogatory, we could obtain  
20 testimony to that effect, even if the witnesses didn't come  
21 here. So that is, from my perspective, in order to defend  
22 Mr. Fuentes Ramirez against those charges, what would be  
23 necessary.

24           And the other point is, it is really a sideshow to the  
25 underlying charges. Either Mr. Fuentes Ramirez can be found --

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1 you know, the jury will believe that he imported hundreds of  
2 thousands of kilos of cocaine into the United States or not.  
3 And whether or not there is political corruption in Honduras or  
4 whether or not Mr. Fuentes Ramirez made political campaign  
5 contributions to certain political figures in Honduras really  
6 is a sideshow to whether or not he imported the cocaine into  
7 the United States.

8 I think that delaying this trial so that we can do  
9 what defense lawyers have to do, which is investigate the  
10 allegations, for what essentially becomes a sideshow, should  
11 not be permitted, and therefore the evidence should be kept  
12 out.

13 THE COURT: All right. Thank you.

14 Does the government wish to add anything to its  
15 written submissions in this regard?

16 MR. LAROCHE: Not to its written submissions, your  
17 Honor.

18 THE COURT: All right. So the government has  
19 identified some examples of what it views as bribery in the  
20 course of and corruption in the course of and in furtherance of  
21 the charged conspiracy. So it claims to have evidence that, in  
22 2009, defendant bribed members of the Honduran National Police,  
23 including CC-3, who was a Honduran National Police Chief, in  
24 exchange for information and to protect the defendant's drug  
25 laboratory; and also evidence that, after the drug laboratory

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1 was raided, in about 2010, the defendant bribed CC-10, who was  
2 a high-ranking judge in Honduras, to avoid investigation or  
3 arrest; and in 2013, defendant contributed money to CC-4 for  
4 his campaign for the Honduran presidency for protection,  
5 assistance transporting cocaine, and to work with CC-4's  
6 brother.

7 I understand the defendant's arguments, but these are  
8 acts which were conducted, allegedly -- and of course it  
9 ultimately becomes a jury question, but on the evidentiary  
10 point, the government proffers that it was during and in  
11 furtherance of the conspiracy. It looks to me that it is not  
12 likely that it is necessary for me to rule on 404(b) as a  
13 backup, although the government argues that even if it wasn't  
14 in furtherance and during the conspiracy, it would be evidence  
15 negating intent and showing a common methodology. But it seems  
16 to me so far that it is evidence in furtherance and during the  
17 charged conspiracy. If any of it is temporally outside of the  
18 conspiracy period, and I'm not sure any of it is, it certainly  
19 would be background to the conspiracy to show why members of  
20 the conspiracy had confidence that these officials would be  
21 receptive to bribe-taking. So presumptively that evidence is  
22 admissible.

23 Now, there are coconspirator statements, turning to a  
24 different subject, that I guess I will call it the government's  
25 second motion *in limine*, and these are coconspirator statements

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1 to Witness 1. There are three of them. I take it that what  
2 the government is proffering is that Witness 1 was present when  
3 a coconspirator made the statement or at least statement one  
4 and three to the defendant? Is that what the government is  
5 proffering?

6 MR. LAROCHE: Yes, your Honor.

7 THE COURT: Okay. So they would be, at least as to  
8 one and three, statements during and in furtherance of the  
9 conspiracy by one coconspirator to another coconspirator, and  
10 specifically the defendant, so they would come in under  
11 801(d)(2)(E), it seems to me, or at worst as adoptive  
12 admissions by the defendant and thus under 801(d)(2)(B) or  
13 804(b)(3).

14 I want to hear what the government's position is with  
15 regard to statement number two, which is not limited or not  
16 focused on drug trafficking, and what is it that Witness 1 is  
17 going to say about CC-4 soliciting large contributions from  
18 what I will call Owner 1, who is not a coconspirator. Is this  
19 something for which defendant was present or is this something  
20 that Witness 1 heard about? I don't quite understand the  
21 context of the statement, so if the government could please  
22 explain.

23 MR. LAROCHE: Yes, your Honor.

24 Witness 1 would testify that he was present for this  
25 statement involving CC-4 and Owner 1.

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1                   THE COURT: So he was present -- he was in the  
2 presence of CC-4 and Owner 1 when the statements were made.

3                   MR. LAROCHE: That's correct, your Honor.

4                   THE COURT: And this is proffered as what? Background  
5 to the conspiracy? It doesn't seem to be evidence of the  
6 conspiracy or an act in furtherance of the conspiracy. At most  
7 it might be background to show the receptiveness of CC-4 to  
8 campaign contributions for a corrupt purpose.

9                   Please explain.

10                  MR. LAROCHE: Yes, your Honor.

11                  First, we have argued and do believe that it would be  
12 in furtherance of the conspiracy and that CC-4's statements in  
13 particular are in furtherance because they spurred assistance  
14 from Owner 1 and created a relationship necessary for CC-4 to  
15 conduct drug trafficking negotiations with the defendant as  
16 Business 1. So we do make the argument and do believe that in  
17 that way it does further the conspiracy.

18                  We also do believe, as your Honor referenced, that it  
19 is important background for the context in which later meetings  
20 happened involving CC-4 and the defendant at Business 1, in  
21 that it shows how and why CC-4 would have meetings regarding  
22 drug trafficking at Business 1, because it's a location that  
23 CC-4 felt comfortable discussing criminal activities and  
24 soliciting large bribes in exchange for promises. With respect  
25 to the defendant, it is promises with respect to drug

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2 trafficking and things that each of them would do for each  
3 other to further the conspiracy.

4 So we do believe that it would be both in furtherance,  
5 but, also, as an alternative, important background and context  
6 as to the existence of the conspiracy that's alleged in the  
7 indictment. And in our reply brief we cite some cases with  
respect to that argument.

8 THE COURT: All right. Now, Business 1 was allegedly  
9 used by the defendant to launder drug trafficking proceeds,  
10 from what I have read from your submissions. Was that the case  
11 at or about the time of CC-4's solicitation of the campaign  
12 contributions in 2013?

13 MR. LAROCHE: Yes, your Honor.

14 THE COURT: Okay. Mr. Moskowitz, I will give you an  
15 opportunity, if there is anything you want to say about the  
16 statements by the witness, statements one, two, and three.

17 MR. MOSKOWITZ: Your Honor, I don't have much more to  
18 add with respect to the statements other than to again say that  
19 if the Court is going to allow these statements in, we need to  
20 be able to take the testimony of the alleged recipient or at  
21 least attempt to take the testimony of the alleged recipient,  
22 so -- who has denied being corrupt and doing anything to  
23 protect drug dealers or taking any money to protect drug  
24 dealers. He has made very public statements about that, and if  
25 the Court is going to allow that in, we should be allowed to

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1 take testimony.

2 THE COURT: Thank you, Mr. Moskowitz.

3 For the reasons that I have already laid out,  
4 statements one and three appear to come in as statements during  
5 and in furtherance of the conspiracy, and statement number two  
6 I need not go any further than to conclude that it's a  
7 background to the conspiracy, although it may also be in  
8 furtherance of the conspiracy.

9 I'm just going to put one thing to rest regarding the  
10 idea -- and I have great respect for defense counsel, who has  
11 appeared before me for the last maybe going on 15 years, and I  
12 think is one of the finest members of our CJA panel -- but, as  
13 everyone knows, that's not how this works. The evidence is  
14 disclosed, and then you move to exclude it, and only if you  
15 move to exclude it does that mean that evidence counts. That's  
16 not the way this works.

17 There are procedures for obtaining disclosure under  
18 Rule 16, under Rule 17, and the fact that the government plans  
19 to offer evidence puts a defendant on notice of that evidence  
20 and the need to investigate. If the Court said, I will rule on  
21 the motion *in limine* until trial, which is a perfectly  
22 appropriate thing for a Court to do, that would not entitle a  
23 defendant on the day of trial to say, well, now that you have  
24 said you are going to let it in, or in the middle of trial, now  
25 I want to investigate.

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1 MR. MOSKOWITZ: Your Honor, if I may?

2 THE COURT: So, that argument, with all due respect,  
3 does not carry the day.

4 MR. MOSKOWITZ: Your Honor, if I may just briefly be  
5 heard --

6 THE COURT: Oh, you want to argue the point or are we  
7 going to move on to the third motion *in limine*?

8 MR. MOSKOWITZ: I just want to make one point on that  
9 issue, Judge, which is, until the government files its motion  
10 *in limine*, I, the defense, did not have notice that this was  
11 going to be part of the trial. The fact that there were  
12 allegations out there were known, but the government never said  
13 and wasn't required to say this is what we are seeking to  
14 prove, and it's perfectly reasonable for defense counsel to  
15 say, you know, if you are not going to offer it, I don't have  
16 to seek letters rogatory and go to Honduras, that is, I don't  
17 have to deal with an issue until it has become an issue. Once  
18 it became an issue, we raised it in our response to the motion  
19 *in limine*.

20 THE COURT: Right. All right. Well, I have stated  
21 what I have stated. I will give the government a brief  
22 opportunity to respond.

23 MR. LAROCHE: Thank you, your Honor.

24 We just would reiterate what we put in our motion,  
25 which is that corruption and also violence we have identified

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1 from very early in the case as being part of -- at least in the  
2 complaint as what we saw as being relevant to the charges and  
3 we laid that out. I think we have tried at every step to make  
4 disclosures in terms of early 3500 production, which certainly  
5 at least identified the information.

6 I don't disagree with Mr. Moskowitz that we didn't  
7 send him a letter saying this is our trial evidence. That  
8 said, we have, at every step, attempted to identify what the  
9 evidence would be.

10 So other than that, your Honor, we stick with what we  
11 put in response in our reply submission.

12 THE COURT: All right. Thank you.

13 Let me turn to coconspirator statements made to Leonel  
14 Rivera, and these are some six statements which are outlined in  
15 the government's submission.

16 Is there anything you want to add to your papers,  
17 Mr. Moskowitz?

18 MR. MOSKOWITZ: Your Honor, I think we have laid out  
19 the arguments in our papers. I would highlight the arguments  
20 with respect to the witness known as Metro, whose alleged  
21 statements to Mr. Rivera form a large part of the government's  
22 case. It is really ironic -- it is ironic and, in many  
23 respects, outrageous and unfair that Mr. Rivera gets to testify  
24 about allegedly incriminating statements made to him by a  
25 witness who he has made unavailable because he murdered him.

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1 THE COURT: Thank you.

2 Is there anything the government wants to respond to  
3 or elaborate from its submissions?

4 MR. LAROCHE: Just briefly, your Honor.

5 We disagree with the characterization that  
6 coconspirator statements from CC-1 comprise a substantial  
7 portion of our case. We have identified two, and we have  
8 identified substantial additional evidence that comes through  
9 not just Leonel Rivera, but other witnesses and other  
10 corroborating evidence.

11 Otherwise, your Honor, we rest on our arguments in our  
12 briefs.

13 THE COURT: First of all, with regard to Metro, CC-1,  
14 I understand the defendant's position that it is rather choice  
15 that, you know, he is not available because of the acts of the  
16 witness who wants to testify. But there is no evidence that I  
17 am aware of that the murder of Metro had anything in any way,  
18 shape, or form to do with eliminating him as a testifying  
19 witness in a trial. That is not the proffered reason, and  
20 there is nothing for me to base any finding at this point on  
21 that. So certainly a -- procuring a witness's unavailability  
22 may be a reason to find something not admissible on the basis  
23 of the witness's lack of availability, but that's not what we  
24 are dealing with based on the proffers that I have.

25 If the testimony turns out to be different at trial,

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2 that will be a different situation. But it seems to me that  
3 they are going to be admissible as coconspirator statements,  
4 and so I don't see a basis to exclude them at this stage.

5 With regard to what I will call the fourth motion *in*  
6 *limine* relating to the five alleged drug murders in furtherance  
7 of the conspiracy, I gather from the defendant's submission  
8 that there is -- that one of the cooperators, if I read your  
9 papers correctly, had participated himself or is going to admit  
10 having participated in a rather large number of murders, is  
that right, Mr. Moskowitz?

11 MR. MOSKOWITZ: Yes. It's my understanding, your  
12 Honor, based on what the government has provided to us, that  
13 Leonel Rivera has admitted to participating in 78 murders and  
14 his brother, Javier, if he testifies, in 48 murders.

15 THE COURT: Okay. Is there anything you wanted to  
16 expand on with regard to the five murders that the government  
17 plans to or proposes to offer evidence of defendant's  
18 participation?

19 MR. MOSKOWITZ: Again, your Honor, here, even more  
20 extreme than the situation with the political corruption, what  
21 makes this situation unusual is that the government has not  
22 provided a single piece of paper other than the 3500 material  
23 from the cooperating witnesses with respect to these murders.  
24 There is not a single coroner's report. There are no police  
25 reports. Other than the statements of Leonel Rivera, we don't

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1 know that these murders took place. And I'm now being required  
2 to defend essentially five murder cases with not a piece of  
3 evidence other than the statements of Leonel Rivera. That is  
4 unfair and, again, if the Court is going to allow this evidence  
5 in, we should be able to investigate what happened and whether  
6 the murders happened and what evidence there is in Honduras as  
7 to who committed these murders, because clearly the defendant  
8 wasn't charged with them in Honduras.

9 THE COURT: Thank you.

10 Anything further from the government?

11 MR. LAROCHE: No, your Honor, other than just to  
12 reiterate what we said in our brief, which is, we disagree that  
13 they are not corroborated, or that there is not additional  
14 information beyond Leonel Rivera, and we have explained that in  
15 the different ways that the fact of these murders, and the  
16 defendant's participation is corroborated beyond just Leonel  
17 Rivera.

18 THE COURT: All right. Thank you.

19 I take the point that there are not documents and  
20 records and autopsy reports and police reports. The relevant  
21 point here is whether the government has such information and  
22 has failed to disclose it or whether the government doesn't  
23 have such documentary evidence. And implicit in the  
24 government's position is that it has turned over what it has.  
25 Is that correct from the government's standpoint?

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1 MR. LAROCHE: Yes, your Honor.

2 THE COURT: And, so, the extent to which the murders  
3 are dependent on the credibility of cooperating witnesses, this  
4 presents an opportunity for the defendant. The thrust of the  
5 government's case, as revealed in their briefing to this Court,  
6 is that it was an environment in which law enforcement could  
7 not be relied upon to investigate crimes that were performed by  
8 the conspiracy in furtherance of its activities, for reasons  
9 that their evidence will show, and so the record is what it is.

10 Again, I repeat what I said. There has been nothing  
11 that has stopped the defense from making -- from having made an  
12 application back on January 8 or so if it wanted something.  
13 Certainly defense has made applications to the Court and the  
14 Court has endeavored to timely rule on them. There was one  
15 that necessitated some travel. I don't need to get into it  
16 because it was an *ex parte* application. The day that  
17 application came in, the Court granted it.

18 I simply don't accept that there is some clock that  
19 begins to run on the day a Court rules on an *in limine* motion.  
20 So it seems to me that it will be the government's burden to  
21 tie the defendant to these murders, to persuade the jury that  
22 the testimony of the witnesses is credible, and of course to  
23 establish that they were during and in furtherance of the  
24 conspiracy. So certainly I am not excluding that evidence at  
25 this stage.

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2 Now, with regard to the government's fifth motion *in  
limine*, there is a photograph of an official Honduran law  
3 enforcement member -- document, rather, showing an  
4 investigation into crimes relating to money laundering, and I  
5 take it that this is from -- this is from the defendant's cell  
6 phone, and I take it that the defendant is not objecting to  
7 that specific item of evidence, is that correct?

8 MR. MOSKOWITZ: That document, at this time, no, your  
9 Honor.

10 THE COURT: And there are also photographs of firearms  
11 and large quantities of U.S. currency. I take it the defendant  
12 doesn't object to the picture of the U.S. currency, is that  
13 correct?

14 MR. MOSKOWITZ: If there is a picture of the defendant  
15 with currency, there is no basis for an objection. Any other  
16 pictures which are -- where the source is not available, we  
17 would object because there are many pictures that are public  
18 source pictures, either from the Internet, from the media, and  
19 unless the government can tie them to the defendant, meaning it  
20 is the defendant's cash or the defendant took the picture of a  
21 coconspirator's cash, for example, without the ability to tie  
22 it to a source and the fact that there is a picture of cash on  
23 the defendant's phone doesn't mean anything or --

24 (Indiscernible crosstalk)

25 MR. MOSKOWITZ: -- for that matter.

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1 THE COURT: Pardon me?

2 MR. MOSKOWITZ: Or weapons for that matter.

3 THE COURT: Right. And weapons you also make the  
4 point that the defendant held certain licenses for firearms.

5 MR. MOSKOWITZ: That's correct, your Honor.

6 THE COURT: All right.

7 MR. MOSKOWITZ: And the handguns, it's my  
8 understanding, your Honor, the handguns were certainly legal  
9 firearms in Honduras. The automatic firearms are more  
10 problematic in terms of their legality; but, again, unless  
11 there is some evidence that those are the defendant's firearms,  
12 the fact that he has pictures of firearms on his phone is not  
13 relevant. If they are public source documents off the Internet  
14 or from the media, they are really irrelevant and they are  
15 prejudicial.

16 THE COURT: All right. Thank you.

17 Well, as I ruled in the Hernandez Alvarado trial, the  
18 fact that a defendant has a license to carry a firearm is not a  
19 defense to a charge of possessing or carrying one in  
20 furtherance of a conspiracy. And whether it goes directly to a  
21 firearm charge or not, it certainly is -- and the government is  
22 entitled to argue that they are tools of a drug conspiracy,  
23 whether licensed or not. That would be true here in the United  
24 States and it is true in Honduras. The fact that someone has a  
25 licensed handgun or that it's lawful to possess some other

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1 firearm in some state does not mean that that firearm cannot be  
2 a tool of a narcotics trafficking conspiracy. And the same way  
3 with currency, whether they are tools or fruits of the  
4 conspiracy.

5 Now, the fact that they are on the defendant's phone  
6 goes to weight, the weight of the evidence. And certainly the  
7 defendant is free to argue that a photograph of either is not  
8 entitled to great weight. And of course I will police the  
9 photos. If there are a multitude, if they become redundant or  
10 inflammatory in some way, then I will cut them back. But the  
11 concept in the abstract I'm not going to exclude at this point.

12 Now, there are also some, I guess, electronic messages  
13 with a Honduran military official described as Comanche, and a  
14 law enforcement official identified as a commissioner, I don't  
15 know whether it is Martinez, or something along those lines.  
16 Is there an objection to those messages?

17 MR. MOSKOWITZ: Yes, your Honor. As we laid out in  
18 our papers, the government speculates as to who these people  
19 are and what their relationship is with the defendant. They  
20 don't know -- they don't have a name for Comanche. They  
21 certainly haven't produced one. Nor do they have any evidence  
22 or have proffered any evidence as to what his role was in the  
23 military, when he was in the military, if he is still in the  
24 military, if he was in the military at the time of these  
25 messages, and what his relationship was with the defendant.

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1 And the same thing is true with respect to the commissioner.

2 Without their ability to identify in a solid way who these  
3 people are, any communications between them and the defendant  
4 are irrelevant.

5 THE COURT: Yes. Let me hear from the government.

6 Why isn't Mr. Moskowitz right about this? If the individuals  
7 are not -- if there is not evidence that they are members of  
8 the conspiracy and that the communication was in furtherance of  
9 the conspiracy, I don't know how it gets in and I don't know  
10 what the probative value is.

11 So there are communications about Lopez Sanabria, and  
12 I know the circumstances, they are in the government's papers,  
13 what the circumstances of that murder was, but that was a  
14 murder that was covered by the international press. And the  
15 mere fact that one person remarks to another person on that  
16 publicly known fact doesn't seem to me to have much by way of  
17 probative value.

18 How do these electronic messages come in and why  
19 shouldn't I exclude them?

20 MR. LAROCHE: Yes, your Honor.

21 First, I will just start on the relevance and  
22 probativeness of these communications and then move to the  
23 basis for their admission.

24 I think when we are looking at the communications with  
25 Comanche, the military official, they come in on several bases.

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1 One is, it shows the significant connection the defendant has  
2 with Honduran military officials such that the defendant  
3 confirmed, in one of his text messages, "100 percent Comanche"  
4 that the military had supported him. That is plainly relevant  
5 to corroborate other witnesses who say that the defendant was  
6 working directly and with the support of the Honduran military  
7 in furtherance of his drug trafficking activities.

8 The Comanche messages also show that the defendant had  
9 a relationship with certain of his coconspirators, in  
10 particular, the Los Valles cartel in which the defendant and  
11 Comanche are making significant admissions relating to their  
12 knowledge of their drug trafficking activities, even after  
13 leaders of the cartel were arrested, and that is relevant  
14 because the defendant is alleged and there will be evidence  
15 that he worked with the Los Valles cartel during the course of  
16 the conspiracy. So the fact that Comanche and the defendant  
17 are talking about that cartel in a way that shows their  
18 knowledge of their drug trafficking activities we believe is  
19 relevant.

20 So in terms of the Comanche, the admissibility of  
21 those communications, we believe the Court need not refer to  
22 coconspirator statements because they can be admissible as  
23 adoptive admissions because the defendant is participating in  
24 those communications. So the Court need not find that Comanche  
25 is in fact a member of the conspiracy in order to admit them.

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1 We have made arguments in our reply brief as to why Comanche  
2 was in fact a member of the conspiracy. We focus in particular  
3 on communications relating to the Valles, and communications  
4 after one of the Valles was murdered which show that the  
5 defendant and Comanche were talking in detail about their  
6 knowledge of what we believe their drug trafficking activities  
7 in this case. So at least with respect to Comanche we feel  
8 there is both substantial relevance and a basis under the  
9 rules, because the defendant was himself participating in the  
10 communications to admit those on several bases.

11 THE COURT: All right.

12 MR. LAROCHE: With respect to --

13 THE COURT: Go ahead.

14 MR. LAROCHE: I'm sorry, your Honor.

15 With respect to the commissioner, your Honor, to begin  
16 with relevance, again, this shows the defendant's consciousness  
17 of guilt, because the commissioner and the defendant are  
18 talking about ways to conceal evidence in connection with an  
19 investigation in Honduras. That is admissible under  
20 consciousness of guilt to show attempts to hide and conceal  
21 evidence.

22 We also believe that these communications with the  
23 commissioner will corroborate witness testimony about the  
24 defendant's corrupt connections to law enforcement and his  
25 ability to use those connections in furtherance of his drug

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1 trafficking activities. And on the admissibility point, again,  
2 it's similar to Comanche. For one, you need not go to  
3 coconspirator statements because they are adoptive admissions  
4 because the defendant participated in those communications.  
5 But even if the Court were to go that next step to determine  
6 whether there are coconspirator statements in furtherance of  
7 the conspiracy, again, we have cooperators who will testify as  
8 to Commissioner Martinez being involved in the conspiracy, and  
9 we believe, based on the evidence that is presented, it is  
10 sufficient to say, based on this, based on those -- that  
11 testimony and based on these communications, that he was a  
12 member and that these attempts to hide evidence were in  
13 furtherance of that conspiracy.

14 THE COURT: All right.

15 MR. MOSKOWITZ: Your Honor, if I could?

16 THE COURT: Let me ask a question of the government.

17 Do I have the full text of each of these messages?

18 MR. LAROCHE: No, your Honor, but we can provide those  
19 to you.

20 THE COURT: All right. Go ahead, Mr. Moskowitz.

21 MR. MOSKOWITZ: Your Honor, I want to make a point  
22 with respect to -- first with respect to Comanche, and that is  
23 the murder of one of the Valles was also a matter of public  
24 discussion and knowledge in Honduras and, again, is no  
25 different than their talking about the other publicly disclosed

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1 or publicly discussed matter, the murder of the witness or the  
2 person related to the Tony Hernandez trial. They were -- when  
3 you look at the text they are talking about, oh, this drug  
4 dealer got killed, oh, well, it was either the police or the  
5 other bad guys. That's what happens in the drug business. And  
6 that's essentially the nature of those conversations. And in  
7 that respect, they are completely irrelevant.

8 With respect to Martinez, there is no context for the  
9 text or the chat that the government seeks to offer, there is  
10 no explanation for why the defendant or no context at all for  
11 why the defendant was asking for this particular type of  
12 software from this particular individual, who we don't know  
13 even who they are, whether they are currently in law  
14 enforcement, whether they are not currently in law enforcement,  
15 whether -- whether the title was honorary, we don't know  
16 anything about them, and neither does the government.

17 MR. LAROCHE: Your Honor, may I just briefly respond?

18 THE COURT: Yes, go ahead.

19 MR. LAROCHE: Sure. First, with respect to Comanche,  
20 I just disagree with the characterization of the communications  
21 relating to the murder of the Valles member. They are talking  
22 pretty specifically about these individuals, quote, "having  
23 taken advantage of many people who they," quote, "fucked with  
24 money from products they are given and then they don't pay up."

25 And then with respect to additional acts of violence,

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1 Comanche says that essentially he has specific knowledge of  
2 such violent acts, saying, quote, "If not just anyone, they are  
3 going to get fucked up. You will see." That is a quote from  
4 this communication. This is not two individuals simply  
5 discussing public reporting about a murder. It's two  
6 individuals who have knowledge of the Los Valles cartel, and we  
7 will provide that full communication to the Court.

8           With respect to the commissioner, we do believe there  
9 is context there in that communication, which we will also  
10 provide, to show that they are in particular talking about  
11 investigations that they are trying to hide information from.  
12 There are specific references by the commissioner to being  
13 hounded by prosecutors, and that plus the prison e-mails which  
14 show that the defendant was trying to reach out to the  
15 commissioner to get nonpublic information about this case shows  
16 that he was not just some random person. This is someone he  
17 goes to when he needs information that is nonpublic to protect  
18 him, which is exactly what our witnesses are going to testify  
19 at trial.

20           So we do believe there is a connection there and a  
21 relevance that is highly probative to support the arguments we  
22 are making that this is more evidence of the defendant trying  
23 to hide evidence -- hide evidence, conceal evidence, and having  
24 corrupt connections with law enforcement in furtherance of his  
25 drug trafficking activities.

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1                   THE COURT: All right. I'm reserving decision on the  
2 issue of the electronic messages and will direct the government  
3 to furnish them to the Court for very view. And I trust they  
4 have already been produced to the defendant?

5                   MR. LAROCHE: Yes, your Honor.

6                   THE COURT: Okay.

7                   Now, with regard to the statements allegedly made by  
8 defendant to Leonel Rivera while in custody, the defendant  
9 raises an argument under the *Massiah* case and its progeny,  
10 urging that statements that were directed or encouraged or  
11 induced by the government through the use of, in this case, a  
12 cooperating witness, are inadmissible without the protections  
13 of *Miranda*.

14                  Let me hear from the defendant on anything you want to  
15 add to what you have asserted in your brief.

16                  MR. MOSKOWITZ: Your Honor, I think the brief speaks  
17 for itself on this point. I would just point out that it is  
18 the government's responsibility, and that's both the United  
19 States Attorney's office and the Bureau of Prisons, both of  
20 which are part of the Department of Justice, to protect the  
21 defendant's Sixth Amendment right. It is unconceivable that  
22 Leonel Rivera just happens to be in the same unit with access  
23 to the defendant just as he was to a defendant in another case  
24 and that people that he, you know -- you know, he doesn't  
25 approach them, they approach him. The whole thing is -- first

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1 of all, the story is ridiculous, but the point is that the  
2 government, whether it is the Bureau of Prisons or the U.S.  
3 Attorney's office or the Department of Justice, if somebody  
4 messes up, if the U.S. Attorney's office asks for a separation  
5 order, the Bureau of Prisons doesn't comply with it, and a  
6 cooperating witness, knowing that it's in his interest to do  
7 so, then solicits or attempts to solicit information from a  
8 defendant in violation of a Sixth Amendment right, the party  
9 that should be penalized is not the defense, but the  
10 government. It is absolutely unfair that Mr. Rivera was  
11 allowed to be in Mr. Fuentes Ramirez's unit and that he  
12 approached him. And after being told don't speak to witnesses  
13 that -- or to defendants that you are cooperating against, he  
14 did it again. The 3500 material makes it very clear that he  
15 was told not to do it, and he did.

16 And even under the government's reading of how it  
17 happened, even based on what Mr. Rivera told them happened, if  
18 the defendant approached him, he knew he should walk away. He  
19 knew, you know, because that's what he was told, don't talk to  
20 defendants that you are cooperating against, and he didn't do  
21 it.

22 THE COURT: All right. Let me hear from the  
23 government.

24 MR. LAROCHE: Your Honor, Mr. Gutwillig is going to  
25 handle this argument.

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1 THE COURT: Thank you.

2 MR. GUTTWILLIG: Yes, your Honor.

3 I think, beyond what's contained in our reply brief, I  
4 would just note that the characterization "did it again" is not  
5 accurate. The government specifically notes in its reply brief  
6 that the episode that counsel is referring to with Fredy  
7 Najera, in his plea agreement, he said that he, Mr. Najera,  
8 with respect to these alleged statements made to the  
9 cooperating witness, that he willfully attempted to obstruct  
10 and impede the administration of justice by making false  
11 assertions about this witness.

12 Also, I think it is probative of the fact that the  
13 government certainly did not direct or encourage the witness to  
14 do this, which is really the inquiry here, by the fact that, on  
15 the day that the defendant arrived at the MCC, the government  
16 put in its separation request.

17 So, you know, all of these things, kind of what the  
18 government highlighted in its reply brief, make it very clear  
19 that this was not a Sixth Amendment violation, that the witness  
20 was not seeking to elicit this, and also that there is no basis  
21 to say that he has done it before, and that argument also is  
22 without merit.

23 THE COURT: Okay. At this stage of the game there is  
24 not evidence of government inducement or procurement or  
25 encouragement of questioning, and so I'm not going to exclude

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1 the evidence at this juncture. Of course I will keep an open  
2 mind if any evidence emerges tending to establish that there  
3 was government inducement and encouragement. That becomes a  
4 whole different story then.

5 Let me ask if there is anything further regarding --  
6 there is a statement in your brief about arguments or, rather,  
7 statements allegedly made by CC-7, a Central American drug  
8 trafficker, to Leonel Rivera, and they are in the background  
9 section of the government's memo. I'm not sure what these  
10 statements are, whether the government is offering them, and  
11 what precisely the defendant's position is.

12 First of all, is the government offering such  
13 statements?

14 MR. LAROCHE: Your Honor, we believe we have  
15 identified the coconspirator statements through CC-7 that we  
16 are seeking to admit through Leonel Rivera, specifically in  
17 that point that we have already reviewed with your Honor.

18 To the extent that changes, we will of course update  
19 everyone and make sure that folks are on notice that we seek to  
20 admit additional statements. But at this point we have  
21 identified specifically the ones that we are focused on.

22 THE COURT: All right. Then I don't know that there  
23 is anything else for me to rule on with regard to that,  
24 Mr. Moskowitz.

25 What else can I help the parties with?

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1                   MR. MOSKOWITZ: Your Honor, I think there is an issue  
2 which, you know, I gather we won't know until the government  
3 attempts to offer them, but in reviewing the government's brief  
4 in preparation for the hearing today, I did note that the  
5 government appears to be preparing to offer statements made by  
6 the defendant in his postarrest statement. I have spent the  
7 time before this argument reviewing the defendant's postarrest  
8 statement, and I guess until we see how the evidence comes in,  
9 I can't object, because obviously they are statements of the  
10 defendant, but I would note that the statements that the  
11 government highlights in its brief were cherry-picked from a  
12 lengthy postarrest interrogation, and the government is  
13 attempting to argue that the statements that they picked were  
14 somehow incriminating. But in the -- if the Court were to read  
15 the context, you know, the entire interview, and see the  
16 context of the statements, your Honor would see that they are  
17 not incriminating at all, but in fact exculpatory. So a  
18 defendant admitting that he knows somebody sounds like it is  
19 incriminating. But when the defendant explains how he knows  
20 that person, and it is in a completely innocent context, that  
21 is not incriminating.

22                   So if the Court is going to allow in the statements at  
23 some point that the government proposes to offer as part of --  
24 you know, as part of the defendant's postarrest statement, I  
25 think the Court needs to see the entire statement and allow in

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1 the statements that give that supposed admission context.

2 THE COURT: Well, I don't have to deal with that at  
3 this stage, and I will certainly be open to hear what everyone  
4 has to say, but this is not an uncommon situation that, in the  
5 course of postarrest interviews, the government wants to offer  
6 very little and the defendant wants to put in everything  
7 because the defendant's intent in making the statement was not  
8 to confess to a crime, but to exculpate himself from the crime.  
9 And generally speaking, the defendant doesn't get to put in  
10 exculpatory statements in the course of the postarrest  
11 interview. And specifically here, if the defendant admits he  
12 knows someone, that admission is simply that he knows someone.  
13 It is unfair argument for the government to say that, as you  
14 saw from the postarrest statement, the defendant admitted that  
15 he was in drug trafficking transactions with the individual,  
16 that's unfair argument not supported by the evidence. The  
17 statement simply is that he knows the person. So I will have  
18 to see everything in context, but it is -- the law does not  
19 support the proposition that the defendant gets to put in the  
20 exculpatory parts from a postarrest statement generally  
21 speaking. Now, there can be contexts where other portions come  
22 in under the rule of completeness, but I will have to look at  
23 that in context.

24 All right. Anything else, Mr. Moskowitz?

25 MR. MOSKOWITZ: No, your Honor. I would note that,

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1 just in terms of the practicality of the trial on March 8, we  
2 received notice yesterday of the Court's directive that  
3 everybody coming into the building now has to have -- be  
4 wearing two masks or K95s or KN95s. I don't know how that  
5 works. I know that I have enough trouble talking and  
6 projecting with one mask and doing it with two masks and being  
7 understood and having everything clear is obviously something  
8 that I am very concerned about. And just to be perfectly -- to  
9 be perfectly frank, Judge, having had to perform with -- you  
10 know, speak in public with masks on, I know that that is  
11 incredibly difficult and incredibly draining on the person  
12 doing the talking and doing -- and two masks make that even  
13 more difficult. The new ruling gives me even greater concern  
14 about how this -- how the mechanics of this trial will work.

15 I am also obviously concerned about the jurors'  
16 ability to deal with the new mandate and whether jurors will  
17 have two masks, have the ability to constantly bring in two  
18 masks, whether the Court is going to provide them. I don't  
19 know any of the details of that, but I am concerned about the  
20 most recent order of the Court just as to the practicality of  
21 proceeding.

22 THE COURT: Thank you, Mr. Moskowitz.

23 I am able to shed a bit of light on all of this due to  
24 a position I hold within the Court relative to the conduct of  
25 jury trials during the pandemic.

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1                   So, number one, the Court will provide a second mask  
2 to jurors during the *voir dire* process, make sure they are all  
3 double-masked. However, when we get past *voir dire* and we have  
4 seated jurors, they will be given the -- the present plan is  
5 that they will be given the opportunity -- the Court will  
6 supply them with N95 or KN95 masks and suggest to them that  
7 they can either wear them or the double-masking, which, again,  
8 we will provide the double masks. So we already are on top of  
9 that.

10                  The good news or the relief that I want you to be  
11 aware of and know about is -- and I have conducted two jury  
12 trials under pandemic conditions -- when you are addressing the  
13 jury in your opening statement or your closing argument or when  
14 you are questioning a witness on cross-examination or on  
15 direct, you will not be wearing a mask. We have constructed  
16 and tested with our experts a booth which has atop it a HEPA  
17 filter which extracts and cleans the air inside the booth, and  
18 you will be speaking into a microphone and you will not be  
19 wearing any mask whatsoever.

20                  It is true that if you are at counsel table and the  
21 government asks a question, you would have your double mask on  
22 or your N95 on, and you would need to state that you object to  
23 the question. You don't even need to rise. You can do it from  
24 a seated position. But you would state that you object. But  
25 the number of circumstances where you would be speaking for any

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2 prolonged period wearing a mask of any kind should not happen  
3 at all. So that is the report I have to give you based on my  
4 information, but thank you for raising your concerns and feel  
free to share the information that I have just given you.

5 MR. MOSKOWITZ: I appreciate that your Honor. That is  
6 very helpful. Thank you.

7 THE COURT: All right. Is there anything else from  
8 the government?

9 MR. LAROCHE: No. Thank you, your Honor.

10 THE COURT: All right. Well, I want to thank all  
11 counsel for the very fine briefing and organization and  
12 presentations, which makes my job a lot easier, so thank you,  
13 and we are adjourned.

14 Thank you, Madam Interpreter and thank you to my court  
15 reporter. Thank you again, and we are adjourned.

16 MR. MOSKOWITZ: Thank you, Judge.

17 MR. LAROCHE: Thank you, your Honor.

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